ARTICLE 82 OF THE E.C. TREATY AND TRADEMARK RIGHTS

By Charles R. Mandly, Jr.

I. INTRODUCTION

In popular literature, trademarks are hailed as instruments of consumer protection (indeed, of consumer empowerment), or vilified as instruments of consumer manipulation by venal corporations. Our schizophrenic attitude toward trademarks is not limited to popular thought. In a recent case, the Court of Justice for the European Communities (ECJ) acknowledged that “[t]rade mark rights constitute an essential element in the system of undistorted competition which the [European Community] Treaty is intended to establish and maintain.” On the other hand, the European Parliament has initiated an as yet to be reported European Commission study of “abuse of trade mark rights,” with particular emphasis on abuses arising from prohibiting importation into the Common Market of less expensive “grey market” branded goods.

This tension between the protection of trademark rights and the abhorrence of monopolies is not new. Even prior to the emergence of modern trademark law, trademarks were decried as monopolistic. Nevertheless, in general, the history of modern trademark law is one of expanding protection.

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Within the European Community there is a vital and powerful competition law governing monopolies. Intellectual property rights (of which trademarks are a subset) do not escape the reach of competition law. The exercise of intellectual property rights, in “exceptional circumstances,” can constitute an abuse of a dominant position in contravention of Article 82 of the Treaty Establishing the European Community.

This essay examines the role and regulation of trademarks under Article 82. Although there is a significant body of literature analyzing the role and regulation of intellectual property rights generally under Article 82, little has been written specifically regarding trademarks. The author contends that by its very nature, a trademark neither constitutes a monopoly (or at least a monopoly cognizable under competition law), nor should its exercise be regulated under Article 82. If firms seek to use trademarks to “monopolize” products, or even non-source information, such issues can and should be resolvable within the trademark paradigm without recourse to Article 82. Consequently, regardless of the merits of regulating the exercise of other intellectual property rights under Article 82, trademarks should not be so regulated. Of course, prior claims that, vis-à-vis other intellectual property rights, trademarks occupy “a league of their own, being predominantly pro-competitive,” and therefore are non-monopolistic, have been dismissed as simplistic.

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7. Treaty Establishing the European Community [E.C. Treaty] art. 82, 1997 O.J. (C 340) 3 (as of 1998). With the Treaty of Amsterdam, the E.C. Treaty was renumbered. For example, former Articles 85 and 86 became Articles 81 and 82 respectively. All text references are to current designations.


Nevertheless, the case for trademark exceptionality, if simple, also is compelling.

In order to evaluate what role, if any, should be played by Article 82 in the regulation of trademarks, this essay: (i) reviews Community competition law governing private economic activities; (ii) discusses arguments for trademark exceptionality; (iii) analyzes Article 82 violations; and (iv) examines the specifics of the role and regulation of trademarks under Article 82.

II. COMMUNITY COMPETITION LAW AND THE REGULATION OF PRIVATE COMMERCIAL ACTIVITY

Articles 81 and 82 of the E.C. Treaty constitute the core provisions of the Community's competition law regulating private firms and traditional private commercial activity. Articles 81 and 82 “complement each other in order to ensure that competition in the Common Market is not distorted as required by Article 3(g) of the [E.C.] Treaty.” Articles 81 and 82 have a “direct effect” upon the national legal orders of the Member States. Consequently, “these Articles apply to relationships between individuals and create rights directly in respect of the individuals concerned which national courts must safeguard.”

Article 81 prohibits certain agreements, decisions and concerted practices among economic actors or “undertakings” “which have as their object or effect the prevention, restriction or distortion of competition within the common market. . . .” Any agreement, decision or concerted practice violating Article 81(1) is “automatically void.” Notwithstanding the forgoing, an otherwise prohibited agreement, decision or concerted practice may be exempted if it promotes, inter alia, economic efficiencies or technical progress.

Unlike Article 81, Article 82 is not concerned per se with agreements, decisions or concerted practices involving multiple undertakings. Rather, Article 82 regulates “unilateral conduct by

14. See Greaves, supra n.6, at 379-80.
17. See id. art. 81(2).
18. See id. art. 81(3).
dominant firms which act in an abusive manner.” It is directed squarely at preventing the misuse of concentrated private economic power. In addition, again unlike Article 81, Article 82’s prohibition against abuse of a dominant position may not be exempted. On its face, therefore, Article 82 is a less discriminating, much blunter, economic regulatory instrument than Article 81.

Importantly, Article 82 does not prohibit dominant undertakings per se. Further, the ECJ “has acknowledged that since dominant undertakings can achieve a dominant position by virtue of greater efficiencies and innovativeness than competitors, they cannot be required to refrain from competing on the basis of legitimate competitive means even if such conduct has the effect of further weakening residual competition on a dominated market.”

Neither Article 81 nor Article 82 should be interpreted “in isolation,” but rather must be understood in a wider Community context. Accordingly, Community competition law has been seen not merely as a vehicle to promote economic efficiencies, but also as a means to promote a wider set of policy objectives, most notably, the creation and maintenance of the single market, as well as broader social policies such as employment and consumer protection.

One particularly controversial use of Community competition law has been its use to protect competitors, particularly small to medium size firms, from the adverse effects of the market. Although essentially discredited in current United States antitrust jurisprudence, and the subject of serious scholarly critique in the

19. See Whish, supra n.11, at 149.
20. Tritton, supra n.12, at ¶ 11-005.
22. See Greaves, supra n.6, at 379.
23. See id.; Whish, supra n.11, at 15-19. The sweep of the Community’s social agenda is seen in Article 2 of the E.C. Treaty:

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities . . ., to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

24. See Whish, supra n.11, at 17-18.
Community,\(^{26}\) this policy is an intellectual legacy of the Freiburg School of ordoliberalism, which was active in Germany during the interwar period.\(^{27}\) The Freiburg School posited maintaining competition by smaller firms as a per se good necessary to avoid undesirable concentrations of economic power inherent in monopolists and cartels.\(^{28}\)

**III. THE CASE FOR TRADEMARK EXCEPTIONALITY**

**A. Trademarks as Intellectual Property**

In a free economy, once a person has entered the market with a product, there is a right enjoyed by all to copy freely, and to compete for the sale of, that product. Intellectual property rights constitute legally sanctioned exceptions to this right to freely copy and compete.\(^{29}\)

Intellectual property is the unsatisfactory rubric under which we traditionally gather patents, copyrights and trademarks.\(^{30}\) A patent is a “limited monopoly” granted by the state to an inventor (or other legally qualified applicant) as an incentive to publicly disclose the invention so that it can be worked by a “person skilled in the arts.” Among the Community’s Member States, the grant is an exclusive right to exploit an invention for a twenty-year term measured from the application date.\(^{31}\) To qualify, the invention must be new, involve an inventive step and be capable of industrial application.\(^{32}\)

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26. See Whish, supra n.11, at 18; see also Eleanor M. Fox, What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect, 70 Antitrust L.J. 371, 404-05 (2002) (suggesting that although Community competition authorities have explicitly reject protection of competitors as a policy objective, such policy continues to underlie and influence Community competition law).


28. See Whish, supra n.11, at 18.

29. See Cornish, supra n.5, at § 1-17; cf., Hodgkinson & Corby Ltd. v. Wards Mobility Services Ltd., 27 F.S.R. 169, 174-75 (Ch. 1995) (Applying English common law of passing off, “There is no tort of copying. There is no tort of taking a man’s market or customers. Neither the market nor the customers are the plaintiff’s to own. There is no tort of making use of another’s goodwill as such. There is no tort of competition.”).


32. See id. at 362.
A copyright is an exclusive right conferred by the state upon authors, inter alia, to reproduce artistic, dramatic, literary or musical works. This right against copying is more limited than the patent monopoly because it does not protect the work from the independently created (i.e., non-copied) works of others. The protection afforded copyright within the Community is the author's life plus 70 years. The precise qualifications for protection for copyrighted works vary under the laws of the Member States, although there appears to be emerging consensus toward a unitary Community standard that the work must embody "the author's own intellectual creation."

A trademark is a different creature altogether. As Professor Michael Blakeney of the University of London observed:

"Probably the principal difficulty in identifying the worthy subjects of intellectual property protection is the existence of trade marks as one of the principal categories... The alleged policy of intellectual property law to provide a reward or incentive for intellectual creativity probably works for all categories of intellectual property right, with the exception of trade marks. One cannot gainsay the commercial importance of trade marks, but to dignify this institution as an intellectual property right provides a challenge for the theoretician."

Blakeney's discomfort regarding the place of trademarks in his pantheon is wholly warranted.

Under Community law, "[a] trade mark may consist of any sign capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings." The essential function of a trademark "is to guarantee the identity of origin of the marked goods or services to the consumer or end users by enabling him, without any possibility of confusion, to distinguish the goods or services of others which have another origin." Consequently, unlike other

33. See id. at 27.
34. J.A.L. Sterling, World Copyright Law ¶ 7.12 (1999). The traditional standard under United Kingdom law, generally perceived as less rigorous than the emerging Community standard, is that the work be the product merely of skill, labour or judgment. See id. at ¶ 7.09.
intellectual property, a trademark does not protect the fruits of the creative mind (e.g., an invention or artistic work). A trademark is merely a symbol of commercial origin, or, in the words of Edward S. Rogers, “[t]rade-marks are nothing but reputation symbolized.”

A trademark may serve as a source indicia regardless of whether the consumer knows the actual identity of the proprietor; it is sufficient that the consumer recognizes the goods originate from a single, albeit anonymous, source. Further, the term source does not necessarily refer to either geographic or production derivation; goods manufactured in disparate places and by different manufacturers may be said to have a common trade identity or source. The unity of source arises from the fact that the public associates the branded goods with the same source as branded goods they previously knew. Unlike other intellectual property rights, trademarks may be perpetual, potentially lasting as long as does the underlying goodwill.

Trademarks have been characterized as “monopol[ies] conferred by the state.” It is true that trademark registration is a state conferral of rights upon the trademark proprietor. It long has been an important tenant of at least Anglo-American jurisprudence, however, that the underlying right protected—the goodwill symbolized by the trademark—is the creation of the individual trademark proprietor, protectable with or without the

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38. See, e.g., Bently & Sherman, supra n.31, at 660.
41. See In re McDowell's Application, 43 R.P.C. 313, 337 (C.A. 1926) (Warrington, L.J.); see also Frank I. Schechter, The Rational Basis of Trademark Protection, 40 Harv. L. Rev. 813, 814-17 (1927), reprinted in 60 TMR 334 (1970); but see Associated Newspapers Ltd. v. Express Newspapers, The Times, June 17, 2003, at 33 (Ch. June 11, 2003) (Laddie, J.) (“It was sufficient for the proprietor of a trade mark to show that it had a distinctive character rather than having to prove that it was a unique identifier denoting only one proprietor”).
42. See Schechter, supra n.41, at 814-16; cf., Case C-206/01, Arsenal Football Club plc, ¶ 48 (single entity must stand behind the mark to guarantee quality).
43. But cf., Sterling, supra n.34, at ¶ 8.08 (perpetual moral rights under French copyright law).
state conferral of registration. Moreover, rather than being state creations, it would seem fairer to characterize trademarks as having emerged organically over centuries from the commercial world. Thus, in contrast to either patents or copyrights, trademarks seem no more the sovereign’s gift than either the institutions of private property or marriage.

Although long pigeonholed as intellectual property, the law of trademarks has its origins in the law of fraud rather than trespass to property. More than fifty years ago, Beverly W. Pattishall suggested that one source of the “monopoly phobia” surrounding trademarks was the characterization of trademarks as property. Property suggests a broader scope of right in the component symbols of the trade indicia than that suggested by a right to be free from probable confusion of source.

Moreover, the classification of trademarks as intellectual property has obfuscated the subject. Thus:

The rationale for trade mark protection will never be properly understood as long as preconceptions about the theoretical bases of patents and copyrights are allowed to obscure one’s thinking, for the rationale of trade mark protection is quite different. Trade marks are not protected to create incentives to invent brand new names or symbols. Trade marks are not protected so that one person can gain a monopoly in using a word or symbol in certain context. Trade marks are protected because of the significance that they acquire in the course of trade. . . . [T]he trade mark is a marketing symbol and its purpose comes from how it is used in the market place.

In light of the clear tension between the underlying rationale for the protection of trademarks and that for “other” intellectual

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49. See Cornish, supra n.5, §§ 3-04 to 3-12, 9-01 to 9-05.


51. See Schechter, supra n.4, at 137-38, 141-43, 152; Bently & Sherman, supra n.31, at 657-58; see also Pattishall, supra n.39, at 983-84 (analyzing the relationship of trademark law to the law of forgery).

52. See Pattishall, supra n.39, at 985-87 & n.41.

property, perhaps we would be better served by striking trademarks from the list of intellectual property and recognizing trademarks as a wholly separate jurisprudential field.

B. Trademark Utility

“Trade marks . . . have become nothing more nor less than the fundament of most market-place competition.”54 The reasons for this are clear. It is an essential premise to the rational functioning of a competitive market economy that consumers have fulsome information on products and their characteristics.55 For simple goods, such information may be obtained by direct observation prior to purchase.56 Where goods possess material unobservable features, however, it is likely that the seller will have much better product information than the buyer. Such “information asymmetry” in a market for undifferentiated products makes it a matter of mere chance whether the buyer obtains the product with the unobservable qualities desired.57 It further rewards “firms . . . produc[ing] products with the cheapest possible unobservable qualities[] because high levels of unobservable qualities would not add to a firm’s ability to sell at a higher price and realize a higher profit.”58 Under such conditions, market failure is inevitable.59

By tying goods to a single, albeit perhaps anonymous, source, trademarks differentiate goods in a manner allowing buyers to discriminate among products based upon unobservable features.60 “Trade marks provide a cipher linking information acquired by experience or from other sources to a product, thus aiding judgments about quality.”61 This linkage between the trademark and goods of a known consistent quality has the further utility of reducing consumer search costs associated with identifying desirable goods.62 Producers are given an incentive to produce consistent quality goods under the trademark because, once the buyers associate the branded product with goods of the desired

54. Cornish, supra n.5, § 15-04.
56. See Pickering, supra n.47, at 86.
57. See Nicholas S. Economides, The Economics of Trademarks, 78 TMR 523, 526 (1988); see also Pickering, supra n.47, at 86.
58. Economides, supra n.57, at 526 (footnote omitted).
59. See George Akerlof, The Market for “Lemons”: Quality Uncertainty and Market Mechanism, 84 Q.J. Econ. 488, 488-500 (1970) (classic analysis of market failure resulting from information asymmetry in market for used cars); Pickering, supra n.47, at 90; Rogers, supra n.48, at 175-76.
60. See Economides, supra n.57, at 527.
quality, the producer will obtain greater profits due both to repeat sales and to sales to new customers who learn of the quality reputation from others. These enhanced profits are the result of both higher sales volume and consumer “willing[ness] to pay higher prices in exchange for lower search costs and greater assurance of consistent quality.”63 Failure to maintain the consistent quality which buyers associate with the mark, for example, through the producer’s conscious decision to obtain a windfall profit by reducing costs associated with producing the expected higher quality, will destroy the value of the mark to the producer as buyers become aware of the change in quality and cease their purchases.64

But for trademarks, external regulation of product quality would be necessary to assure consumers that a product met at least a minimum quality.65 The cost and complexity of such a regulatory system, embracing the whole of the consumer products market, cannot be overstated.66 Moreover, even if it were possible to imagine a regulatory scheme embracing all basic categories of consumer products, it is virtually inconceivable that such a regulatory system could accommodate the degree of product differentiation which is demanded (rightly or wrongly) by Western consumers.67

Finally, in addition to the case for trademark utility, it should be remembered that “it is only fair to protect a man in the reputation he has built up for himself and his products, and [to] prevent other people from appropriating it. . . .”68

C. Trademarks: The Thin “Monopoly”

As previously discussed, the utility of a trademark comes directly from its tying goods to a single, albeit perhaps anonymous, source. It is self-evident, therefore, that use of a trademark by a person other than the source previously associated by consumers with that symbol is antithetical to the symbol’s source indicating function, at least to the extent that the junior user’s use leads consumers to associate the junior user’s use with that of the senior

63. Id., at 272; see also Pickering, supra n.47, at 88-89.
65. See Economides, supra n.57, at 530; see also Cornish & Phillips, supra n.55, at 46.
66. See Economides, supra n.57, at 530; see also Carl A. Auerbach, Quality Standards, Informative Labeling, and Grades Labeling as Guides to Consumer Buying, 14 Law & Contemp. Probs. 362 (Spring 1949) (a trademark-less post-war United States that might have been).
67. See Economides, supra n.57, at 530.
68. See Rogers, supra n.40, at 249 (emphasis added).
user. “If the law does not prevent it, free riding will eventually destroy the information capital embodied in the trademark. The prospect of free riding may therefore eliminate the incentive to develop a valuable trademark in the first place.” To prevent free riding (i.e., trading upon the goodwill of another) and the fraud inherent in allowing one person to pass off his or her goods as those of another, historically the law has afforded protection against the use of marks likely to cause confusion.

The “exclusive right” recognized by trademark law (i.e., to be free from confusingly similar marks) is very different from the exclusive right in a patented invention or the protection from copying in a copyrighted work. As previously discussed, the trademark right protects not the good itself, but rather the indicia of source for that good (or, more accurately, the goodwill symbolized by the indicia). But even as to the source indicia, the “exclusive right” is quite limited.

The threshold for establishing a protectable trademark interest in a symbol can be relatively demanding. By its very terms, Community law denies trademark protection to a symbol which, inter alia, “consist[s] exclusively” of elements constituting trade designations of “kind, quality, quantity, intended purpose, value, geographic origin or the time of production of the goods . . . or other characteristics of the goods . . .” or which have become “customary in the current language or in . . . the practices of the trade.” This prohibition is qualified, however, because trademark protection may be accorded to a descriptive symbol upon a showing that it has acquired a “distinctive character” through use. It follows, therefore, that trademark protection is accorded as a matter of right under Community law only where the symbol, although pre-existing, has no linguistic meaning in relationship to the product (i.e., an arbitrary mark such as KIWI for shoe polish).

69. Landes & Posner, supra n.44, at 272; see also Sanders & Maniatis, supra n.45, at 411 & nn.42-43.
70. See Schechter, supra n.41, at 820-22; see also Paris Convention for the Protection of Industrial Property of March 20, 1883 (as amended), art. 10bis (3)(1), 828 U.N.T.S. 305 (hereinafter “Paris Convention”).
71. See supra at Section III.A.
73. Trade Marks Directive art. 3, § 1.(d); CTM Regulation art. 7, § 1.(d).
74. Trade Marks Directive art. 3, § 3; CTM Regulation art. 7, § 3.
75. Subject, of course, to earlier conflicting rights, Trade Marks Directive art. 4; CTM Regulation art. 8, other absolute prohibitions, see Trade Marks Directive art. 3, § 1.(f)&(g); CTM Regulation art. 7, § 1.(f)&(g), and making use of the symbol in a manner in which the public will understand it to be an indicia of origin, see Case C-299/99, Koninklijke Philips Elec. NV v. Remington Consumer Prods. Ltd., [2002] E.C.R. I-5475, [2002] 2 C.M.L.R. 52, ¶¶ 65-64.
or did not previously exist and was created specifically to serve as a trademark (i.e., a coined mark such as XEROX for photo-copi-ers), or where the symbol, while having some linguistic relationship to the product, is “merely allusive or suggestive” of the goods rather than being directly descriptive thereof (e.g., BABY-DRY for disposable diapers).76

As previously noted, a descriptive symbol may be protected under Community law where it becomes distinctive of the adopter’s goods through use. The more descriptive the symbol, the greater the evidentiary showing must be before trademark protection is accorded.77 Some terms are so descriptive, being understood by consumers as the “apt” or “common name” of the goods, that no degree of acquired distinctiveness will be sufficient to make them protectable trademarks.78

Even where a symbol is deemed worthy of trademark protection, such protection does not confer an absolute right in the symbol. Community law explicitly provides that a trademark right shall not entitle the owner to prohibit third party trade use of descriptive terms provided that such usages are “in accordance with honest practices in industrial or commercial matters.”79 In other words, “just as the owner of the ‘Vittel’ trade mark cannot prohibit another producer from stating in good faith that its water is bottled at Vittel, . . . Proctor & Gamble[, owner of the ‘Baby-Dry’ trade mark for disposable diapers, cannot] prevent a rival from claiming that its diapers ‘keep your baby dry.’”80

The “exclusive” trademark right does not even extend to prevention of third party use of the mark to describe the third party’s goods vis-à-vis the trademark owner’s goods. Thus, Community law also explicitly provides that a trademark right shall not entitle the owner to prohibit third party trade use of the trademark itself “where it is necessary to indicate the intended purpose of a product . . ., in particular as accessories or spare

78. See JERYL LYNN Trade Mark, 26 F.S.R. 334, 497-98 & 504 (Ch. 1998) (Laddie, J.). Whether a term is an unprotectable generic designation, however, should not be determined in the abstract, but rather should turn upon consumer understanding of the term in connection with the subject goods or services. See Trade Marks Directive art. 3, §§ 1 & 3; CTM Regulation art. 7, §§ 1 & 3.
79. See Trade Marks Directive art. 6, § 1; CTM Regulation art. 12.
parts,” again subject to the requirements of commercial morality.81 The “exclusive” trademark right even has been found not to preclude trade use of the mark to describe directly competitive goods as being of the same kind as the trademark owner’s goods.82 Moreover, whether through the trademark owners own misuse of the trademark, or simply because the public independently comes to perceive the mark as the “apt” or “common name” of the product, previously valid trademark rights in a symbol may be forfeited (e.g., CELLOPHANE, ASPIRIN, ESCALATOR).83

The “exclusive” trademark right basically extends no further than to preclude uses likely to cause source confusion.84 The likelihood of confusion must be among a material number of potential consumers and be determined through a global appreciation of relevant factors.85 Accordingly, trade identity protection within the bounds of likelihood of confusion does not prevent any use of the subject symbol beyond that necessary to prevent consumer source deception. “[T]o the extent that its corresponding use by others is likely to result in confusion of source with the prior user, that much the prior user’s individual trade identity should be protected and use denied to another—no more, no less.”86

The monopoly specter is particularly raised by extending trademark protection to three-dimensional objects, including product shapes.87 Under Community law, if a three-dimensional object has a distinctive character (either inherent or acquired), then it is capable of distinguishing the goods of one person from

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83. See Trade Marks Directive art. 12, § 2; CTM Regulation art. 50, § 1; see also JERYL LYNN Trade Mark, 26 F.S.R. at 497-98.

84. See Trade Marks Directive art. 5, § 1; CTM Regulation art. 9, § 1(a)-(b). Thus, it may be possible for two different individuals to own valid trademark rights in the same mark, albeit for wholly dissimilar goods. See, e.g., L.E. Waterman Co. v. Gordon, 72 F.2d 272, 273 (2d Cir. 1934) (Learned Hand, C.J.) (“There is indeed a limit; the goods on which the supposed infringer puts the mark may be too remote from any that the owner would be likely to sell. It would be hard, for example, for the seller of a steam shovel to find ground for complaint in the use of his trade-mark on a lipstick.”); but cf., Trade Marks Directive art. 5, § 2 (extending protection against signs which take unfair advantage of, or are detrimental to, the distinctive character or repute of the trademark); CTM Regulation art. 9, § 1(c) (same); Case C-292/00, Davidoff & Cie SA v. GoKid Ltd., [2003] E.C.R. I-389, [2003] 1 C.M.L.R. 35, ¶¶ 26 & 30.


86. Pattishall, supra n.39, at 979.

those of another and, generally, may be accorded trademark protection.\textsuperscript{88} Trademark protection, however, explicitly is denied symbols which “consist exclusively” of: “the shape resulting from the nature of the goods themselves”; “the shape of the goods which is necessary to obtain a technical result”; or “the shape which gives substantial value to the goods.”\textsuperscript{89} These provisions are to be interpreted to protect the “public interest” against the creation under trademark law of a monopoly “on technical solutions or functional characteristics of a product which a user is likely to seek in the products of competitors.”\textsuperscript{90} With regard to technical solutions, it is of no consequence that alternatives are available.\textsuperscript{91} These prohibitions are absolute; no degree of acquired distinctiveness will confer protectable rights.\textsuperscript{92} Consequently, as a matter of law, trademark protection is withheld from functional and technical product features and, absent some other intellectual property right in such features, they are freely available for use by all.

For the reasons previously discussed, trademark “monopoly,” such as it is, is quite thin.\textsuperscript{93}

\textbf{D. Trademarks in the Community Context}

Intellectual property rights, including trademarks, historically have been viewed with suspicion within European Community jurisprudence.\textsuperscript{94} This, in part, is another Freiburg School legacy;\textsuperscript{95} the ordoliberalists viewed such rights as sources of undesirable, undemocratic “monopoly” power.\textsuperscript{96} Such hostility also is attributable to an unrelenting pursuit of the single market imperative. Because intellectual property rights largely are creatures of the national laws of each Member State and are territorial in scope (and, therefore, largely geographically coterminous with national borders), such rights were perceived as impediments to the creation of the single European market.\textsuperscript{97} A direct assault upon intellectual property rights, however, seemed to be precluded by the E.C. Treaty itself, which provides that the

\begin{itemize}
  \item \textsuperscript{89} Trade Marks Directive art. 3, § 1.(e); CTM Regulation art. 7, § 1.(e).
  \item \textsuperscript{90} Case C-299/99, Koninkijke Philips Elecs. NV, at ¶¶ 77-78.
  \item \textsuperscript{91} See id. at ¶ 81.
  \item \textsuperscript{92} See id. at ¶ 76.
  \item \textsuperscript{93} See Rogers, supra n.40, at 249 (“monopoly” interest in trademarks is no greater than the “monopoly” enjoyed by the owners of realty or tangible personality).
  \item \textsuperscript{94} See Korah, supra n.27, at 803.
  \item \textsuperscript{95} See supra Section II.
  \item \textsuperscript{96} See Korah, supra n.27, at 803-04 & n.9; Gerber, supra n.27, at 52
  \item \textsuperscript{97} See Korah, supra n.27, at 803.
\end{itemize}
Treaty does not “prejudice the rules in Member States governing the system of property ownership.”

To combat the perceived threat posed by intellectual property rights to European integration, the ECJ adopted a view under which it “drew a distinction between the grant or existence of a national intellectual property right, which was not subject to the [E.C.] Treaty, and its exercise, which was.” Of course, “[t]he lawyer’s definition of a right that exists is the sum of the ways it can be exercised.” This existence/exercise dichotomy seemingly defies meaningful legal analysis and has been described by Professor Valentine Korah of the University of London in terms of being essentially an ex post facto rationalization for upholding or striking down intellectual property rights as best fits the ECJ’s market integration objectives.

Through the application of the existence/exercise dichotomy, the Court imposed an aggressive regime of exhaustion of rights within the Common Market. Accordingly, once a protected product had been put on the market by the holder of an intellectual property right or with its consent in one member state, the right was exhausted and a parallel intellectual property right could not be used to restrain the commercial importation of the product to another member state. The integration of the market trumped the rationale for intellectual property rights.

Even within this generally hostile environment for intellectual property rights, trademarks were singled out for special enmity. The ECJ explicitly stated that trademarks are “distinguishable . . . from other forms of industrial and commercial property, inasmuch as the interests protected by the latter are usually more important, and merit a higher degree of protection, than the interests protected by an ordinary trade-mark.” Further, “[t]he exercise of a trade-mark right is particularly apt to lead to partitioning of markets, and thus to impair the free movement of goods between

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98. See E.C. Treaty art. 295.
100. See id. at 805 & n.17.
101. See id. at 805.
102. See id. at 805-06.
103. Id. at 805 (footnote omitted); see generally Whish, supra n.11, at 704-11.
states which is essential to the Common Market.” Although the source indicating functions of trademarks were deemed “useful” to consumers, the Court dismissively concluded that this function could be served by means (tellingly not specified by the Court) other than disruptive trademarks. Trademarks also were deemed to be suspect because, unlike other forms of intellectual property, they existed for an indefinite term. Not until the early 1980’s did this general antipathy to intellectual property rights begin to abate within the Community.

It is not surprising, therefore, that the ECJ “has long maintained that the prohibitions in Articles [81] and [82] are unyielding restrictions upon the exercise of intellectual property rights,” and “has regularly held that the exercise of [intellectual property rights] must defer to the competition rules in cases where the two are in conflict.”

IV. ARTICLE 82 VIOLATION

Article 82 provides in pertinent part, “Any abuse by one or more undertaking of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.” Consequently, the elements of an Article 82 violation may be said to be: (1) the action taken by the undertaking that is the subject of complaint must affect trade between the Member States; (2) the undertaking (or undertakings) must have a dominant position; (3) the dominance must extend to the whole or a substantial part of the Common Market; and (4) the undertaking’s conduct must be deemed to be an abuse within the meaning of Article 82. We examine each element in turn.

A. Inter-State Trade Effect

To fall within Article 82’s parameters, an undertaking’s conduct must have an effect upon trade between Member States. “The inter-Member State trade clause is . . . of central importance in E.C. Competition law, since it defines ‘the boundary between the areas respectively covered by Community Law and the law of

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108. Id. ¶ 11.


110. Anderman, supra n.8, at 9 (footnote omitted).
the Member States.”111 The inter-Member State trade clause has been liberally construed to provide an expansive application of Article 82.112 The requirement is satisfied if the alleged conduct could affect the structure of competition within the specified market, for example, through the elimination of a competitor.113 “In view of the territorial nature of intellectual property rights, it is extremely unlikely that a situation could be envisaged often where an argument could be sustained that the behaviour of the owner of the right did not affect trade between Member States.”114

B. Dominance

The ECJ has defined “dominance” as “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.”115 The ability of an undertaking to act independently on the market is the essential condition for finding dominance.116 The determination of whether an undertaking holds a dominant position is a two-step process requiring: (1) the identification of the pertinent market; and, (2) the determination of whether the subject undertaking enjoys market power within that market.117

1. Market Definition

According to the European Commission, relevant market definition “is a tool to identify and define the boundaries of competition between firms.”118 The defined market establishes

112. See Whish, supra n.11, at 111, 151.
113. See id. at 113, 118, 151.
114. Greaves, supra n.6, at 380; see also Hedvig K.S. Schmidt, Article 82’s “Exceptional Circumstances” That Restrict Intellectual Property Rights, 23 Eur. Competition L. Rev. 210, 211 (2002). At least in connection with Article 81 cases, however, there does seem to be some trend in the direction of deferring to Member State regulation in this field by declining to find the requisite effect. See Whish, supra n.11, at 111.
116. See Whish, supra n.11, at 153.
117. See id. at 152; see also Greaves, supra n.6, at 380.
“the framework within which competition policy is applied...”

“The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertaking involved face.” Accordingly, a relevant market is defined in terms of both products and geographic area in order to determine both existing and potential competitors of the subject undertaking that are capable of constraining the undertaking’s behavior and of preventing it from behaving independently of effective competitive pressure. Market definition, therefore, is more an economic judgment than a legal determination.

The product market component is not limited to the particular product being offered by the subject undertaking. Rather, the relevant product market “comprises all those products... which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use.” The geographic market component “comprises the area in which the undertakings concerned are involved in the supply and demand of products..., in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because conditions of competition are appreciably different in those areas.” Thus, the geographic component essentially frames the relevant product market, and has been said to be “obvious” in most cases.

There are two principal sources of competitive restraint defining the relevant market: demand substitutability; and supply substitutability. Demand substitutability generally is considered to be the more important of these sources. Demand substitutability analyzes the range of products viewed as substitutes by consumers. Supply substitutability analyzes whether suppliers are able to switch production to the relevant products. Supply substitutability should be considered only where suppliers are “able to switch productions to the relevant products and market them in the short term [(i.e., the period which does not imply a significant adjustment of existing tangible and intangible assets...)] without incurring significant additional costs or risk...”

120. Id. ¶ 2 (footnote omitted).
121. See id. ¶¶ 2 & 13.
122. Id. ¶ 7.
123. Id. ¶ 8.
124. See Greaves, supra n.6, at 380.
125. Commission Notice, supra n.118, ¶ 13; see generally Whish, supra n.11, at 26-30.
127. Id. ¶ 15.
128. Id. ¶ 20.
A third source of competitive restraint, albeit one which is not used to define the relevant market, is potential competition. Potential competition analyzes whether new suppliers will enter the pertinent market to produce and distribute relevant products. If deemed relevant, the effect of potential competition is considered only once other competitors are identified and the analysis suggests the existence of a competitive problem in the relevant market.129

Conceptually, defining the relevant market in terms of substitutable products appears quite straightforward. The practical application of the principle, however, may be more complex.130 In order to make the determination of substitutability, the Commission has adopted the so-called SSNIP test (i.e., Small but Significant Non-transitory Increase in Price).131 The SSNIP test assumes the subject undertaking has made a “hypothetically small (in the range 5% to 10%), but permanent relative price increase in the products and areas being considered.”132 The effect of this hypothetical price rise is then analyzed in terms of demand substitution and, if appropriate, supply substitution. If in reaction to this price increase customers of the subject undertaking “would switch to readily available substitutes or to suppliers located elsewhere . . . [so as] to make the price increase unprofitable because of the resulting lost sales, . . . [these] substitutes and areas are included in the relevant market.”133

Both the Commission134 and the ECJ135 have recognized that the definition of the relevant market often has a decisive influence on the determination of the existence of dominance in an Article 82 investigation.136 “If the market is wrongly defined, then all

129. Id. ¶ 24.
131. See Commission Notice, supra n.118, ¶ 15; see also Whish, supra n.11, at 27. Interestingly, although SSNIP was developed by the United States Department of Justice, the test is not used by it to define markets in cartel and monopolization cases, but rather only in merger cases. Whish, supra n.11, at 27-28 & n.9; see also Harbord & von Graevenitz, supra n.130, at 151-52.
132. Id. In applying the SSNIP test, care must be exercised to avoid the so-called “Cellophane fallacy.” Accordingly, if a product is being supplied by an undertaking already holding a monopoly position, and a “monopolist price” is being charged for the product, then it follows that further price increase will be unprofitable. “Implementing the SSNIP test from the current monopoly price will lead us to define the relevant . . . market too widely, and we will incorrectly conclude that a monopolist has no market power.” See Harbord & von Graevenitz, supra n.130, at 151-52; see also Whish, supra n.11, at 28-29.
135. See Whish, supra n.11, at 25; Schmidt, supra n.114, at 211; Tritton, supra n.12, at ¶ 11-005.
subsequent analysis based on market shares or market structure is flawed.” 137

In general, a broadly defined market, with an expected corresponding increase in potential substitute goods, makes a finding of dominance by an undertaking under Article 82 less likely. 138 Inevitably in an Article 82 investigation, the Commission will define the market narrowly in both product and geographic terms to facilitate a finding of dominance. 139 For example, in United Brands Co., a case “often referred to as a paradigm” for narrow market definitions, 140 the ECJ affirmed the Commission’s determination that bananas, not fresh fruit generally, constituted the relevant product market. The Court justified this extremely narrow market definition on the grounds that bananas are interchangeable with other fresh fruit to “only a limited extent” because bananas are a year-round fruit, thus not subject to “unavoidable seasonal substitutions.” Further, as compared to other fruits, and in particular other year-round fruits such as apples, grapes and oranges, bananas were characterized by an “appearance, taste, seedlessness, easy handling, [and] constant level of production which enabled it to satisfy the constant needs of an important section of the population consisting of the very young, the old and the sick.” 141

The limitation of the United Brands’ market to bananas seems unduly restrictive. Thus:

When assessing demand-side substitution it is not necessary for all consumers to switch away from bananas for the wider market to be relevant. It would have been sufficient for the parties to show that a sufficient number of consumers would consider other fruits substitutes to render the hypothetical price increase unprofitable. However, . . . the [ECJ] appears to have required virtually complete substitutability, ignoring the existence of many marginal customers who could have switched away from bananas and whose existence could very well have constrained pricing to competitive levels. 142


138. See Whish, supra n.11, at 27.


140. See Vrins, supra n.139, at 579.


In addition, the emphasis placed by the Court upon unique product characteristics such as softness and “seedlessness,” and the purported appeal that such features hold for consumers, particularly the elderly, does not seem grounded in empirical data.  Such reasoning by Community competition authorities and the courts appears to be “malleable” and lacking of analytic “rigor,” which “suggests impressionistic reasoning in service of a predetermined (regulatory) outcome...”

2. Market Power

Having defined the relevant market, one must determine whether the subject undertaking is dominant within that market. As previously noted, a dominant undertaking is one that has the ability to act independently on the market. Such independence may manifest itself in various ways such as an “ability to act as a price leader, if it can dictate the conditions of sale for its products, if it is able to deter entry [into the market by other undertakings], or if it can make persistently super-normal profits.” A dominant firm is said to enjoy market power.

The degree of market power enjoyed by a given undertaking will vary according to the particular conditions of competition prevailing within the relevant market. Under the conditions of “perfect competition,” it is presumed that no undertaking within the relevant market possesses market power, and they “have to take the going price, and cannot hope to alter it on their own.” When one or more undertakings possess market power, they can unilaterally change the market conditions as described above. The greater degree of independence from market constraints enjoyed by the undertaking, the greater degree of market power it is said to possess. Thus, there is a continuum of market power rising from none in a hypothetical perfect market to total market power where a relevant market is reduced to a single supplier (i.e., a monopoly). True monopolies are rare, however, and almost all

143. See id. at 26-27.
145. See supra Section IV.B.
147. Whish, supra n.11, at 153; Black, supra n.146, at 292.
149. Id.
150. See generally Pickering, supra n.47, at 72-73 (on perfect free markets).
151. See Bannock, supra n.148, at 263, 283.
Article 82 cases will fall somewhere between these points of the continuum.\(^{152}\)

Although not dispositive, an undertaking’s market share within a relevant market “may be regarded as a proxy, albeit an imperfect one, for determining dominance. . . .”\(^{153}\) In general terms, the greater the market share, the greater the likelihood of a finding of dominance under Article 82. It does appear, however, that a market share of approximately 40% will be required to establish the existence of a dominant position under Article 82.\(^{154}\) Moreover, market share may rise to a sufficiently high percentage that, absent a showing of “exceptional circumstances,” market share evidence alone will be deemed to establish dominance, particularly where a large share is maintained over time.\(^{155}\) Where an undertaking is shown to possess a market share of at least 50%, a rebuttable presumption of dominance is established.\(^{156}\)

In most cases, however, an inquiry beyond determination of market share alone should be made.\(^{157}\) Additional factors which may be pertinent include: barriers to entry; conduct (e.g., discriminatory pricing offers, other anticompetitive conduct); economic performance (e.g., idle production capacity); and wrongful intent to monopolize. Of these, barriers to entry are the most important factor.

Barriers to entry are “[e]conomic and technical factors which prevent or make it difficult for firms to enter a market and compete with existing suppliers.”\(^{158}\) Under Community law, barriers to entry may include: legal provisions (e.g., intellectual property rights, government licensed activities, domestic content laws); superior technology; deep pockets (i.e., access to capital); economies of scale; vertical integration and distribution systems; product differentiation; and opportunity costs.\(^{159}\) It is further suggested that competition authorities and the courts are likely to interpret “‘technical and commercial advantages’ of any kind” as

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152. Whish, supra n.11, at 153.
153. Id. at 153-54.
154. See id. at 43; but see European Commission, Xth Report on Competition Policy ¶ 150 n.4 (1981) (market share of merely 20% may be sufficient). A firm probably would not be deemed dominant under United States law without at least a 60% market share. See Jebsen & Stevens, supra n.144, at 479.
157. See Whish, supra n.11, at 41, 153-54.
159. See Whish, supra n.11, at 156-61; see also Bannock, supra n.148, at 28; Black, supra n.146, at 27.
suspect barriers to entry.\textsuperscript{160} It is remarkable that many of these “barriers” may “reflect nothing more than efficiency and success in enhancing consumer welfare,” and their treatment as indicia of dominance “suggests a certain predisposition with respect to outcome.”\textsuperscript{161}

Under Community law, the consequences of a finding that an undertaking holds a dominant position are significant. The most obvious of these consequences is, of course, that Article 82 may only be invoked against a dominant undertaking. Moreover, the ECJ has held that a dominant undertaking “has a special responsibility not to allow its conduct to impair undistorted competition on the general market.”\textsuperscript{162} The special responsibilities imposed upon dominant undertakings create duties not merely within the relevant market in which the undertaking is deemed to be dominant, but also in ancillary markets.\textsuperscript{163}

Where an undertaking is not merely dominant, but “enjoys a position of dominance approaching a monopoly” (e.g., 90%), it may be said to be in a position of “super-dominance.”\textsuperscript{164} It has been suggested that undertakings enjoying a super-dominant position may be prohibited from engaging in activities that would otherwise not be deemed abusive under Article 82.\textsuperscript{165} In any event, it seems clear that a super-dominant undertaking is subject to a heightened version of the special duty imposed upon merely dominant undertakings and is therefore more likely to be found to be guilty of abuse under Article 82.\textsuperscript{166}

\textbf{C. Common Market}

A finding of mere dominance is insufficient under Article 82; such dominance must be found to exist throughout the whole or a substantial portion of the Common Market. This requirement is not merely a reiteration of the determination of the pertinent

\begin{itemize}
  \item \textsuperscript{161} See Jebsen & Stevens, supra n.144, at 483-84.
  \item \textsuperscript{162} E.g., Case 322/81, Michelin v. Commission, [1983] E.C.R. 3461, [1985] 1 C.M.L.R. 282, ¶ 57; see also Whish, supra n.11, at 161-62.
  \item \textsuperscript{163} See Jebsen & Stevens, supra n.144, at 476-78.
  \item \textsuperscript{165} See Whish, supra n.11, at 162-63.
  \item \textsuperscript{166} See id. at 162-63, 167; see also Anderman, supra n.8, at 150.
\end{itemize}
geographic market, but rather is a requirement to avoid de minimis violations.\footnote{167} Dominance throughout the Common Market would appear to satisfy this requirement per se.\footnote{168}

Where less than the entire Common Market is involved, the issue of “substantiality” does not turn merely upon the physical size of the territory in which dominance exists and the determination must be made with reference to a variety of market factors.\footnote{169} There is no magic threshold share of the overall product market set by Community law for “substantiality.”\footnote{170} However, “it is likely that each Member State would be considered to be a substantial portion of the common market, in particular where an undertaking enjoys a statutory monopoly. . . .”\footnote{171}

\textbf{D. Abuse}

The next element is whether the subject dominant undertaking has abused its dominant position. “The concept of abuse is an objective concept. . . .”\footnote{172} Consequently, “behaviour can be abusive even where the dominant undertaking had no intention of infringing Article 82.”\footnote{173} In interpreting the meaning of abuse under Article 82, the ECJ has given great weight to the need to promote the policy objectives embodied in Articles 2 and 3(g) of the E.C. Treaty.\footnote{174}

The reach of Article 82 is not restricted to large firms or major economic activities; Article 82 may be used to regulate even the most obscure economic sectors.\footnote{175} Thus, a firm with worldwide sales of approximately £38,000,000 was deemed dominant in the market for British-style brass band instruments.\footnote{176} Discriminatory sales of 574,300 tickets to the 1998 World Cup was deemed an Article 82 abuse.\footnote{177}

\begin{footnotes}
\item[167] See Whish, supra n.11, at 164; see also Greaves, supra n.6, at 380.
\item[168] See Whish, supra n.11, at 164.
\item[170] See Whish, supra n.11, at 164-65.
\item[171] See id. at 164; see also Greaves, supra n.6, at 380.
\item[173] See Whish, supra n.11, at 167.
\item[174] See id.; see also Jebsen & Stevens, supra n.144, at 458-61; see generally supra Section II.
\item[175] Whish, supra n.11, at 165-66.
\end{footnotes}
Article 82 does not provide a comprehensive definition of what conduct constitutes an abuse. Rather, Article 82 contains a non-exclusive list of conduct constituting “abuse,” namely:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.\(^{178}\)

Article 82 can be said to embrace three different concepts of abuse—exploitative conduct, anticompetitive practices, and abuses harmful to the single market.\(^{179}\) Exploitative conduct “is the narrower economic concept of ‘exploitive abuse’, i.e. conduct which consists of using market power to extract supracompetitive gains from customers by unfairly high prices . . . and limiting supply to markets . . . .”\(^{180}\) Exploitative conduct is explicitly prohibited by subsections (a) and (b) of Article 82.

Anticompetitive practices are “predatory or ‘anticompetitive abuse,’ i.e. conduct attempting to evict or exclude competitors from the market.”\(^{181}\) Although said to be “hinted at” in the sub-section (c) discriminatory treatment prohibition and in the subsection (d) tie-in prohibition, the prohibition against anticompetitive practices is not explicit in Article 82.\(^{182}\) Rather, Article 82’s sweeping anticompetitive conduct prohibition was inferred by the ECJ from Article 82, together with Articles 2 (e.g., promoting continuous and balanced economic expansion) and 3(g) (i.e., prohibiting market distortions), so as not merely to prevent market distortions, but also to preserve competition within markets.\(^{183}\) Anticompetitive conduct includes, inter alia, prohibitions against tie-ins, discriminatory pricing and mergers harming market structure, as well as refusals to supply.\(^{184}\)

\(^{178}\) E.C. Treaty art. 82.
\(^{179}\) See Whish, supra n.11, at 168, 169, 179
\(^{180}\) Anderman, supra n.8, at 148.
\(^{181}\) See id.
\(^{182}\) See id.; see also Whish, supra n.11, at 170-71.
\(^{184}\) See Whish, supra n.11, at 175-79.
The third abuse concept under Article 82 is conduct harmful to the single market. Accordingly, Article 82 has been interpreted to prohibit both contractual and unilateral conduct by a dominant undertaking having the effect of disrupting the free flow of goods among member states.  

Of these three abuse concepts, Community competition authorities have had most frequent recourse to the prohibition against competitive abuses.  

As previously discussed, unlike Article 81, conduct violating Article 82 prohibitions may not be exempted. Nevertheless, “abuse” is interpreted to exclude conduct which is found to be “objectively justified” or “proportional.” The line between abusive conduct on the one hand, and objectively justified or proportional conduct on the other, “is very fine—sometimes invisible. . . .”  

As previously discussed, Community competition authorities use competition law to maintain the existence of smaller competitors. A particularly controversial application of competition law is found in the refusal to supply and essential facilities cases.  

Under some circumstances, a dominant undertaking’s unilateral refusal to deal will be abusive. In Commercial Solvents, the ECJ held that a dominant undertaking’s unilateral decision to discontinue supplying an essential raw material to a producer that was dependent upon that dominant undertaking, thereby effectively putting the producer out-of-business, was abusive, and not justified by the fact that the undertaking’s subsidiary was entering the same downstream manufacturing market as the producer.  

The Commercial Solvents doctrine has been extended well beyond a mere refusal to supply raw materials or finished goods. Relying upon Commercial Solvents, the European Commission has held that an Article 82 abuse may occur where a dominant undertaking denies another the use of an “essential facility.” An essential facility is “a facility or infrastructure without access to

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185. See id. at 179-80.
186. See id. at 169.
187. Supra at Section II.
188. Whish, supra n.11, at 180-81.
189. Id. at 170.
190. Supra at Section II.
191. Whish, supra n.11, at 611.
192. See id.
194. See Whish, supra n.11, at 612-16.
195. See id. at 616.
which competitors cannot provide services to their customers." 196

According to the Commission:

A dominant undertaking which both owns or controls and itself uses an essential facility ... and which refuses its competitors access to that facility or grants access to competitors only on terms less favourable than those which it gives its own services, thereby placing the competitors at a competitive disadvantage, infringes Article [82].... The owner of an essential facility which uses its power in one market in order to strengthen its position in another related market, in particular, by granting its competitors access to that related market on less favourable terms than those of its own services, infringe Article [82] where a competitive disadvantage is imposed upon its competitor without objective justification. 197

Owning an essential facility may be equated with holding a de facto monopoly, thereby imposing upon the dominant undertaking a materially heightened duty to competitors. 198

Essential facilities are not limited to tangible goods or infrastructure. In the now infamous Magill decision, 199 the ECJ held that three television broadcasters collectively had abused their dominant position by refusing to grant copyright licenses to a publisher that desired to publish a weekly television programming guide. Each of the broadcasters published its own weekly guide to its own programming, but there was no single weekly guide available to consumers that collectively disclosed the programming of the three broadcasters. While expressly disclaiming that the broadcasters’ copyrights in their respective programming guides conferred a dominant position, the court found that each had a de facto monopoly over the information and that such a monopoly was not shielded from Article 82 simply because it was subject to valid national copyright protection. In “exceptional circumstances,” the exercise of valid national intellectual property rights may be an Article 82 abuse. 200 Exceptional circumstances were found here because, without justification, the broadcasters’ refusal to license the publisher denied the public a product not heretofore available

197. See id.
198. See Whish, supra n.11, at 163; Anderman, supra n.8, at 150; see also supra Section IV.B.2.
200. See id. ¶¶ 46-50.
for which there was clear public demand. The court affirmed the remedial imposition of compulsory copyright licenses.

V. TRADEMARKS AND ARTICLE 82

As previously discussed, given the liberality of their construction, the inter-state trade effect and Common Market elements of an Article 82 violation are almost always deemed to be satisfied. Consequently, in looking at the specific role of trademarks in Article 82 jurisprudence, we shall focus on the remaining two elements—the existence of dominance and abuse.

A. Dominance

The ECJ “has made it absolutely clear that an undertaking is not dominant merely because it is the owner of an intellectual property right.” Professor Rosa Greaves of the University of Durham has observed that this places intellectual property rights in “a privileged position because [they] do confer market power, but are not automatically dominant within the meaning of Article [82].” Accordingly, in evaluating dominance in relationship to goods protected by intellectual property rights, regard must be had to potential substitutes. Greaves notes, however:

Although it is highly unlikely that a patented product will have no substitutes, the same cannot be said for products protected by trademarks, copyright and design rights if the test of substitutability is dependent on the characteristics of the user. It was commented at the time that the product market in United Brands could have been narrowed even further, to “Chiquita” bananas themselves (the branded product).

Although she does not elaborate upon her views, it appears that Greaves believes that trademarks differentiate products in a

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203. Supra Sections IV.A. & C.

204. Greaves, supra n.6, at 381 (footnote omitted); see also Case 40/70, Sirena S.r.l. v. Eda S.r.l., [1971] E.C.R. 69, [1971] C.M.L.R. 260, ¶ 16 (“the proprietor of a trade-mark does not enjoy a ‘dominant position’ within the meaning of Article [82] merely because he is in a position to prevent third parties from putting into circulation, on the territory of a Member State, products bearing the same trade-mark.”).

205. Greaves, supra n.6, at 381.

206. Id. (emphasis added).
manner which precludes the acceptability of substitute goods by consumers. Such a view, of course, would not be unique.

The most influential proponent of the view that trademarks confer market power by differentiating products is the late Professor Edward H. Chamberlin of Harvard University. Chamberlin, a member of the so-called Harvard School of Economics, argued that there is a synthesis of competitive and monopolistic elements at work in the modern free economy; a condition he designated “monopolistic competition.” To eliminate the operation of market power, Chamberlin observed that it was necessary that all producers produce “identical goods” sold in “identical markets.” Where producers produced even “slightly different” products, or such goods were sold under conditions where consumers were otherwise influenced to favor one seller over another for any reason (e.g., “personality, reputation, . . . or the tone of his shop”) and regardless of whether the differences are “real or fancied,” the products are no longer identical because these differentiated attributes, together with the underlying good, constitute a unitary “bundle of utilities.”

Chamberlin specifically studied the role of trademarks in the economy of monopolistic competition. According to Chamberlin, by differentiating products, trademarks moved the economy further away from a state of perfect competition. Individual monopolies were created in each different branded (i.e., differentiated) product. Trademark law, by protecting the exclusive rights of one producer to use a trademark, “preserv[es] not competition, but monopoly.” Consequently, “[t]o permit . . . [trade-mark] infringements . . . would be to purify competition by eliminating monopoly elements.”

This is not to say there is no competition in the monopolistic competition world. As Chamberlin acknowledged, “[a] monopoly of


208. See Pickering, supra n.47, at 76 n.33; see generally id. at 76-83 (Harvard School and trademarks).


210. See id. at 7-8.

211. See id. at 7-8, 56.

212. See id. at 57-64, 204-08.

213. See id.

214. Id. at 205.

215. Id. at 204. According to Chamberlin, however, the public interest in preventing public deception would be served by requiring the copyist to produce goods of the same quality as the goods of the trademark owner. Quite how this was to be accomplished is unclear. See id. at 207.
LUCKY STRIKES does not constitute a monopoly of cigarettes.\textsuperscript{216}

“[Al]though a monopoly in a narrow, technical sense is present, it is difficult to envisage how the responsible trademark could be economically damaging on its own when it distinguishes the product from competitive substitutes.”\textsuperscript{217} Chamberlin’s trademark “monopoly” is not a “monopoly” that would be recognized by many.\textsuperscript{218}

Moreover, few would posit as a “welfare ideal” the world of Chamberlin’s “perfect competition” since it would require wholly “homogenous” products and consumer taste.\textsuperscript{219} As Chamberlin observed, “wherever there is a demand for diversity of product, pure competition turns out to be not the ideal but a departure from it.”\textsuperscript{220} Consequently, regardless of the astuteness of his descriptive insight into the workings of the contemporary market, Chamberlin’s monopolistic competition theory appears to have little, if any, value as a basis for the application of competition policy.\textsuperscript{221}

At a simplistic level, there is some appeal to Chamberlin’s position that trademark owners enjoy monopoly rights by reason of the branding of their products. Clearly, to at least some consumers, a handbag bearing the GUCCI mark will be deemed more desirable than an identical handbag bearing the J.C. PENNY mark, and, as a consequence, the former commands a higher price for its handbag than the latter. Only the owner of the GUCCI mark may lawfully affix that mark to its goods; other competitors are precluded by law from introducing their own GUCCI branded bags to compete with the lawful trademark owner.

Notwithstanding this “limitation” on competition, however, it is clear that for many consumers the J.C. PENNY branded bag, although perhaps not a completely identical product to the GUCCI branded bag, nevertheless is a substitutable product. When viewed in a marketplace offering not merely J.C. PENNY and GUCCI branded bags, but also SEARS and WAL-MART branded bags, COACH and EVAN-PICONE branded bags, and PRADA and LOUIS VUITTON branded bags, it would be the odd consumer who would not find a substitutable product for the GUCCI branded bag, regardless of the degree of his or her brand loyalty. The “monopoly” in GUCCI bags enjoyed by the trademark owner is ephemeral.

\textsuperscript{216} Id. at 65; see also Edward H. Chamberlin, Product Heterogeneity and Public Policy, 40 Am. Econ. Rev. 85, 86-87 (May 1950).

\textsuperscript{217} Pickering, supra n.47, at 80.

\textsuperscript{218} See Harbord & von Graevenitz, supra n.130, at 153-54.


\textsuperscript{220} Chamberlin, n.216, at 92.

\textsuperscript{221} See Handler, supra n.47, at 441 n.3.
Moreover, even ownership of a widely recognized trademark assures the trademark owner of neither high consumer brand loyalty nor a material market share. Consequently, well-known trademarks per se do not confer significant market power.\(^{222}\)

For the reasons previously discussed,\(^{223}\) a trademark confers the thinnest of “monopolies.” It neither confers exclusive rights in non-origin information nor in functional product attributes. It does not confer monopoly rights in a symbol per se nor even in the use of that symbol to identify the trademark owner’s products. At least under traditional theories, the trademark “monopoly” extends only as far as is necessary to prevent potential consumer confusion as to the source of the goods bearing the mark. Although the determination of the existence of a monopoly ultimately must be one of fact, it seems remarkably unlikely that a monopoly will be accorded by reason of the protection of trademark rights alone.\(^{224}\)

Consequently, trademarks should not be deemed to confer market power for purposes of determining the existence of a dominant position under Article 82.

Even if we accept arguendo that a trademark properly may be used to define a product market for purposes of analyzing dominance for competition law purposes, basic trademark principles suggest that there is little risk of monopolization posed by the subject trademark. It is likely that in a “single-brand market[,]” consumers would come to understand the brand name as the generic or common descriptive term for the single-brand product. Consequently, “the likelihood of genericide [i.e., the loss of rights in a mark resulting from its perception as the apt or common name for the goods] would abate the danger of monopoly.”\(^{225}\)

**B. Abuse**

1. **Refusal to Deal, Essential Facilities and Compulsory Licenses**

   For the reasons discussed immediately above, trademarks should not be deemed to confer market power. If, however, trademarks are deemed to differentiate goods in a manner conferring market power upon trademark owners, trademark rights may be put at risk. The owner of any particularly “well-known trade mark” might be deemed to hold a dominant position

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\(^{223}\) See supra at Section III.C.


\(^{225}\) Blakeney, supra n.35, at 420.
within a single product market.\textsuperscript{226} As Professor Greaves noted, trademark owners should be “worr[ied]” because the ownership of such rights “becomes a particularly significant factor in assessing dominance in the defined relevant market.”\textsuperscript{227} Such a trademark owner, as a de facto monopolist,\textsuperscript{228} would be bound by the ill-defined special duty to avoid the impairment of undistorted competition.\textsuperscript{229} As we saw in Magill, the ECJ has ruled that under certain circumstances, a dominant undertaking may be required to license its intellectual property rights to avoid abuse of a dominant position.\textsuperscript{230}

To date, Magill, a copyright case, is the only decision where a compulsory intellectual property license has been granted as a remedy under Article 82. Given the absence of additional compulsory licensing grants, some commentators dismiss the natural concerns of intellectual property owners regarding the application of the essential facilities doctrine to such rights.\textsuperscript{231} Such sanguinity may be misplaced.

Some commentators have noted that an important factor in the compulsory licensing grant in Magill was the implicit assumption that the copyrighted materials—television programming information—was less worthy of protection than other materials protected by intellectual property laws.\textsuperscript{232} As we have seen, at least historically, the ECJ has viewed trademarks as less worthy of protection than other intellectual property rights.\textsuperscript{233} Moreover, to the extent that trademarks are perceived as monopoly rights, the more likely competition law authorities are to perceive such rights as essential facilities necessary for use by third parties to sell competitive, or even non-competitive, goods.\textsuperscript{234}

As we have seen, the misperception of trademarks as monopoly


\textsuperscript{227} Greaves, supra n.6, at 381.

\textsuperscript{228} See Vrins, supra n.139, at 579-80, 581 (Greaves' “assertion that, in United Brands, the market could have been restricted to Chiquita [branded] bananas alone—in which case Chiquita would have had 100 per cent market share in its (own!) market—is not unfounded: . . . Is not it, after all, the . . . purpose of all trade mark owners to create a brand which destroys any substitutability with others?”).

\textsuperscript{229} See supra Section IV.B.2.

\textsuperscript{230} See supra Section IV.C.


\textsuperscript{233} Supra Section III.D.

\textsuperscript{234} See Opi, supra n. 232, at 423-24.
rights remains strong, particularly in academic circles. 235 Unfortunately, such misperceptions spread far beyond the academy. Thus, as recently as this year, the ECJ cited Community Trade Mark Office officials as characterizing a trademark as conferring a “legal monopoly” in the subject sign. 236 Although we may take some comfort from the ECJ’s explicit reaffirmation of the value and importance of trademark rights within the Community’s single market, 237 it also should be remembered that this reaffirmation was made in the face of English litigation which previously had sought to allow a competitor to sell football team merchandise, complete with registered trademarks, on the ground that such use was not trademark use, but rather merely emblems of team loyalty, unlikely to deceive consumers. 238

Furthermore, if a trademark is treated as a product attribute rather than simply an indicia of origin, it is not difficult to envision cases arising where a trademark owner’s refusal to license his or trademark could preclude the introduction of a new product for which there was at least some public demand (e.g., GUCCI branded dog collars or PORSCHE branded baby strollers). Under Magill, it is at least possible that the frustrated licensee could seek a compulsory license under Article 82 against the de facto monopolist (i.e., the trademark owner) to permit the introduction of a product that probably could not be made available without a trademark license. 239

The chronic misperception of trademark rights within the European Community, coupled with the continuing viability of the idea that competition law should protect (particularly smaller) competitors, is a source of continuing uncertainty and concern regarding the role and regulation of trademark rights. 240 Although compulsory trademark licenses are not yet operating within the Community, such licenses still yet could be granted as Article 82 remedies.

235. See, e.g., Lunney, supra n.10, at 367-465; Sanders & Maniatis, supra n.45, at 406, 411.


240. Cf., Fox, supra n.26, at 404-05 (noting less rigorous economic analyses of Community competition authorities coupled with a continuing concern to protect competitors).
As a matter of public policy, a compulsory remedial trademark license should not be granted. As we have seen, trademark utility depends upon use of the symbol to tie a product to single, albeit anonymous, source. The ECJ has held that a trademark cannot “fulfil its essential role in the system of undistorted competition” unless the branded goods “have been manufactured or supplied under the control of a single undertaking which is responsible for their quality.” Consequently, compulsory licensing of trademarks is antithetical to, and wholly incompatible with, Community trademark law.

Compulsory licensing invalidates a trademark by placing it in the hands of firms other than the trademark owner. By displacing the single source behind the mark, compulsory licensing is deceptive. Moreover, adopting compulsory licensing as a competition law remedy undermines the value not merely of the subject mark, but also of the entire trade identity system because a consumer would not know if a mark is being used in the customary fashion or under a compulsory license. “Either [the consumer] would be unable to rely on any trademarks, which would leave him without adequate means of selection, or he would have to assume the risk of relying on a term that does not indicate the source he would otherwise anticipate.”

If the compulsory license is not made subject to quality controls, “even minimal standards cannot be anticipated.” Even if the license grant is subject to quality control, it is unlikely to protect consumers. Because licenses may be held by multiple independent firms, there is little incentive for them to maintain quality because the reputation symbolized by the licensed mark may be injured by the actions of any one of them over which the others have no control. The trademark owner has no real enforcement mechanism because the license cannot be terminated and it is questionable that a public authority would have the same concern for maintaining the goodwill represented by the licensed mark. Finally, the licensees may have the perverse incentive to

241. Supra Section III.B.
244. See Palladino, supra n.243, at 535; Cornish & Phillips, supra n.55, at 62-63.
245. Palladino, supra n.243, at 536.
246. Compare id. at 538, with supra Section III.B.
247. See Palladino, supra n.243, at 538.
248. See id.; McCarthy, supra n.243, at 228-29.
damage the goodwill symbolized by the mark in order to put their own brands in a better market position.\textsuperscript{249}

2. Excessive Pricing

As previously discussed,\textsuperscript{250} it is to be expected that goods bearing well-established brands command a premium price as an incentive for quality maintenance. In a world where, “[t]hrough ingenuous marketing, a simple designer label can turn a comfy $10 T-shirt into a $100 object of aspiration,”\textsuperscript{251} however, it is not surprising that trademarks often are seen as instruments of exploitive pricing. The ECJ long has suggested that prices charged for some branded goods may be so excessive that they are tantamount to a Rule 82 abuse.\textsuperscript{252}

A price is excessive if “it has no reasonable relation to the economic value of the product. . . .”\textsuperscript{253} Whether the price is so excessive that it is abusive may be determined with reference to either the absolute price or the price of other competing products.\textsuperscript{254} This standard is highly subjective and may prove analytically difficult given the complexity of factors that may legitimately affect product pricing (e.g., advertising, marketing, product development costs across the entire product line, etc.).\textsuperscript{255} This standard is particularly unhelpful in evaluating luxury goods, the very exclusivity (i.e., costliness) of which makes them desirable to some consumers.\textsuperscript{256}

The ECJ’s recent rejection of the doctrine of international exhaustion of rights\textsuperscript{257} seemingly has given new impetus to excessive pricing attacks.\textsuperscript{258} Some argue that where goods are sold for a lesser price outside the Common Market than within, such a price differential should be regarded as evidence of excessive pricing.\textsuperscript{259} At a basic level, such analysis fails to account for the

\textsuperscript{249} See McCarthy, supra n.243, at 227-28.
\textsuperscript{250} See supra Section III.B.
\textsuperscript{254} See id. ¶ 252; see also Whish, supra n.11, at 635-36.
\textsuperscript{255} See Heide, supra n.3, at 165-66 & 167; Jebsen & Stevens, supra n.144, at 504-06; Tritton, supra n.12, at ¶ 11-079.
\textsuperscript{256} See Tritton, supra n.12, at ¶ 11-079.
\textsuperscript{258} Heide, supra n.3, at 163.
\textsuperscript{259} See id. at 165.
fact that goods sold under a trademark in a territory outside the Common Market may be materially different from the product sold under that mark within the Common Market. Where there are such material product differences, any price comparison based upon such goods is at least suspect as a yardstick for determining excessive prices. Moreover, even if the products are identical, price comparisons involving markets beyond the Common Market may not be warranted. To assure a meaningful analysis, price comparisons should be made only between “markets having similar conditions of supply and demand;” a rarely met condition.

Finally, in light of the fact that trademarks do not confer real monopoly power upon their owners and consumers are free to choose alternative products, indeed products identical in all but trade indicia, it would seem far wiser to avoid state intervention in the market and to allow consumers to purchase according to their own preferences.

3. Other Abuses

(a) Pre-emptive Registrations

The Commission has held that national registration of a trademark by a dominant undertaking may constitute an abuse under Article 82. Such an abuse occurs when the undertaking knew or reasonably should have known that the mark was already in use by a competitor in another Member State because the registration restricts the competitor’s opportunities for entering the dominant undertaking’s market. Recourse to Article 82, however, should be unnecessary.

If a firm has acquired a reputation, symbolized by a particular trademark, in a Member State other than those in which it does business, then that firm should be able to prevent the dominant undertaking (or any other firm) from obtaining (or at least maintaining) a national registration for that mark in each state in which the senior user enjoys a reputation.

If the senior user does not enjoy a reputation under its mark in a Member Country, a trademark law remedy still should be available. Community trademark law provides for revocation of a trademark registration where it is established that the applicant

261. See Heide, supra n.3, at 166-67; Whish, supra n.11, at 636.
262. See Pickering, supra n.47, at 82-83.
264. See CTM Regulation, art. 8(2)(c) (implementing Paris Convention art. 6bis (1), well known marks); see generally Ruth Annand & Helen Norman, Blackstone’s Guide to the Community Trade Mark 49-51 (1998).
acted in bad faith in filing its trademark application.\textsuperscript{265} Although bad faith has been narrowly construed by the Office for the Harmonization of the Internal Market (OHIM), it does prohibit “unfair practices involving lack of any honest intention on the part of the applicant . . . at the time of filing.”\textsuperscript{266} OHIM has strongly suggested that bad faith may invalidate a Community Trade Mark registration “where the applicant was aware that someone else intends to use/or register the mark, . . ., or where the applicant copied a mark being used abroad with the intention of pre-empting the proprietor. . . .”\textsuperscript{267} Moreover, although the concept of bona fide intent to use is not explicitly incorporated into Community trademark law, it may readily be inferred from the requirement of use of a mark to maintain a registration.\textsuperscript{268} If an application was filed solely for pre-emptive purposes, the requisite bona fide intent to use would be absent.

Of course, given the territorial nature of trademark rights, if the dominant undertaking adopted the mark in good faith without knowledge (actual or constructive) of the senior user in a Member State where the senior user is neither trading nor to which its reputation has extended, then the dominant undertaking should enjoy the unfettered right to use that mark in such territory.\textsuperscript{269} Any apparent hardship to the senior user is easily ameliorated by ready access to the Community Trade Mark registration system.

(b) Agreement to Refrain from Using a Trademark

In Chiquita/Fyffes plc, the Commission held that an agreement to forego use of a trademark benefiting a dominant undertaking may, under certain circumstances, constitute an Article 82 abuse.\textsuperscript{270} Prior to 1986, Chiquita, through a subsidiary, exclusively sold its bananas in the United Kingdom under the FYFFES trademark. During this period, Chiquita, through another subsidiary, sold some of its bananas on the Continent under the FYFFES trademark. In 1986, Chiquita sold its United Kingdom and Irish businesses, including the FYFFES trademark,
to Fyffes plc, while retaining the FYFFES mark in at least certain continental Member States. Fyffes plc agreed to refrain from selling fresh fruit in continental Europe under the FYFFES mark for a period of up to twenty years even though Chiquita discontinued its use of the mark by 1989.271

Although the twenty-year prohibition against use in Chiquita/Fyffes plc seems somewhat excessive, there can be objectively reasonable justifications for precluding the use of a previously well established mark by a junior user even where the mark no longer is in use by the senior user. It is widely recognized that goodwill may continue to exist in a mark long after the owner ceases using the mark.272 Consequently, at least during the period of residual goodwill, prohibiting a junior user’s use of the mark would appear justified by the senior user’s legitimate desire to preclude public deception which necessarily would result if the junior user stepped into the vacated shoes of the senior user.

(c) Dispenser Exclusivity

The Commission has held that it is abusive for a dominant undertaking to require retailers exclusively to stock the undertaking’s single-wrapped impulse ice cream products in freezer-cabinets supplied and maintained for free by the undertaking to such retailers.273

In Van den Bergh Foods Ltd., Unilever PLC. ("Unilever"), doing business as Van den Bergh Foods Ltd., provided freezer cabinets (presumably all prominently bearing one or more Unilever trademarks) to Irish ice cream retailers without direct charge but subject to the requirement that the retailer stock the cabinet exclusively with Unilever ice cream products. Unilever was a dominant undertaking, having an eighty-five percent (85%) share of the Irish ice cream market. In the face of objections by Mars, Inc., Unilever sought to avoid liability for a competition law offence by changing its practice to allow retailers to rent the freezers without requiring cabinet exclusivity. Market surveys, however, established that Unilever’s changed practices had not in fact changed market conditions (presumably, most Irish retailers

271. Id. ¶168.


preferred a “free” exclusive cabinet to a “rented” non-exclusive cabinet).\textsuperscript{274}

In finding that Unilever’s inducement of retailers to enter into exclusive cabinet agreements constituted an abuse of its dominant position in violation of Article 82,\textsuperscript{275} the Commission found that, given the nature of the Irish ice cream market, ice cream retailers accepting a “free” Unilever freezer cabinet were unlikely to stock competing ice cream products because such retailers tended to be smaller stores without space for more than one ice cream freezer.\textsuperscript{276}

Notwithstanding the foregoing, it appears that Unilever may have been able to defend its original cabinet exclusivity practice as a necessary means of protecting its trademark rights. There are various goods (e.g., gasoline and fountain soft drinks) where the dispenser (e.g., gasoline pump and soda fountain) is the primary, if not the only, means by which the mark may be affixed or applied to the goods, and the public relies upon the dispenser’s trademark display to identify the source of the dispensed goods. Sales of third party products through such dispensers are likely to deceive consumers as to the source of those goods.\textsuperscript{277} Even as to goods which may otherwise be individually branded (e.g., bottled soft drinks or candy bars), it is not too much of a leap to anticipate that consumers could reasonably associate the source of those goods with the owner of the trademark prominently displayed on the dispensing vending machine or display cabinet. Consequently, where there is objectively reasonable evidence that consumers probably would be confused by purchasing third party products through dispensers bearing another’s trademark, dispenser exclusivity may be justified and should not be deemed abusive.\textsuperscript{278} Of course, in Van den Bergh Foods Ltd., once Unilever changed its cabinet exclusivity practices to permit Irish retailers to stock non-Unilever brands in rented freezer cabinets, this trademark protection justification was forfeited.


\textsuperscript{275} As an independent basis for its decision, the Commission also found that the cabinet exclusivity agreements violated Article 85. Id.

\textsuperscript{276} See id.


VI. CONCLUSION

For the reasons noted in this essay, trademarks are not monopolies. Trademarks confer ownership over neither products nor more abstract symbols. Indeed, within the traditional bounds of protection, the “exclusive” trademark right excludes others only to the extent necessary to avoid consumer deception. Moreover, trademarks are essential to the meaningful product differentiation which is the foundation of rationally functioning consumer product markets. Consequently, trademark use should be excluded from the regulatory scope of Article 82.

As we have seen, there is a substantial body of literature condemning trademarks as monopolistic. As Edward S. Rogers observed, however, “[m]onopoly is merely an ugly word used by people to put a curse on any kind of property they do not like.”

The attack upon trademark rights and the purported irrational consumer market they purportedly support suggests unhappiness not with trademarks per se, but rather with market economics. Certainly, there is much to criticize with the cult of alienating materialism accepted by many individuals. However, there is little new in mankind’s use of possessions, in particular obviously expensive possessions, as signals to our fellows of our social standing. That trademarks have been incorporated into these symbolic social communications is hardly surprising, and no more irrational than many other social activities.

Like others, without necessary endorsement, the author accepts the primacy of market economics and seeks to understand trademarks within the prevailing social milieu. The author endorses the view of the late Milton Handler, “[a]nti-trust and trade-marks are essentially complementary in their objectives... Anti-trust seeks to keep competition free... Trade-marks and unfair competition endeavour to keep competition fair.”

279. Rogers, supra n.40, at 249.
280. See Herbert Marcuse, One Dimensional Man 4-5, 49-50 (2d ed. 1991) (social control through “false needs”).
282. See Maniatis, supra n.10, at 66.
283. Handler, supra n.47, at 441.